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The Fisheries Proposals: An Assessment

CHANNING KURY*

INTRODUCTION

Several major proposals for the regulation or division of the international fisheries were made at the Law of the Sea Conference at Caracas, Venezuela in 1974. A few broad generalizations can be made concerning these proposals as an introduction to this assessment.

Douglas Johnston has observed that ". . . the juridical problem of the world's fisheries is to establish and maintain a public order of the seas that will allow equitable and efficient sharing so as to maximize the benefits obtainable from the resources without threatening their future productivity."¹ This problem is a classic case of a variable-sum or mixed-motive contest in that the interests of the various nations are simultaneously both partially opposite and partially congruent. The interests are opposite in that a fish taken by one nation cannot be harvested by a fisherman of another nation. The interests are congruent in that a well regulated fishery can be an ongoing, bountiful supply of food and other benefits for many nations.

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1. D. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES: A FRAMEWORK FOR POLICY ORIENTED INQUIRIES* 129 (1965).

The principal function of the Law of the Sea Conference, as Deutsch noted in a much more general context, is the provision of a basis for coordinating nations' expectations and actions.² An understanding of what was and is going on in the area of the law of the sea was neatly summarized by Claude's discussion of "the urge for formally declared and generally acknowledged legitimacy" as a feature of politics. He observed that:

This urge requires that power be converted into authority, competence be supported by jurisdiction, and possession be validated as ownership. Conversely, if we look at it from the viewpoint of those who attack the status quo, it demands that the *de facto* be denied or deprived of *de jure* status, that the might of their antagonists not be sanctified as right. The principle is the same, whether we are dealing with those who want the *is* to be recognized as the *ought*, or those who are setting out to convert their *ought* into a newly established *is*. Politics is not merely a struggle for power, but also a contest over legitimacy, a competition in which the conferment or denial, the confirmation or revocation, of legitimacy is an important stake.³

Although the 1974 conference at Caracas was in large part pre-saged by Seyom Brown and Larry Fabian,⁴ there were those, much like Morel in *The Roots of Heaven*,⁵ who were inevitably disappointed as to what was actually done.⁶ Some of this disappointment has fueled an effort at unilateral action, notably, a 200-mile interim fishery zone for the United States. This effort has been controversial since there has been no clearly defined and widely recognized "national interest" on this matter. While United States coastal fishermen would apparently gain by such a zone, United States distant water fishermen fear other nations acting similarly. Other issues include whether such an action would provide a basis for other nations to curtail movements of the United States Navy and whether such interim action would be proper in light of the ongoing Law of the Sea Conference.

These introductory comments are made in order that the following assessment may be read with a realistic frame of mind. Law is typically evolved through controversy with many inherent limitations and costs. There will not be, in fact cannot be, an optimal

2. K. DEUTSCH, *THE ANALYSIS OF INTERNATIONAL RELATIONS* 161 (1968).

3. I. CLAUDE, *THE CHANGING UNITED NATIONS* 74-75 (1967).

4. Brown & Fabian, *Diplomats at Sea*, 52 *FOREIGN AFFAIRS* 301 (1974).

5. R. GARY, *THE ROOTS OF HEAVEN* (1958).

6. See, e.g., Coffey, 55 *NATIONAL FISHERMAN* No. 7 (Nov. 1974).

body of law for the utilization of the sea. What can be hoped for, though, is a *corpus juris* that will be responsive to natural and societal limitations and demands. It is chiefly with this criterion in mind that the following assessment has been made of some of the fisheries proposals.

ANADROMOUS FISHERIES

Anadromous and catadromous fisheries differ from many marine resources in that these fisheries have an obvious dependency upon habitat located within recognized and well-defined national borders. In migrating through fresh-water, these fish are particularly vulnerable to exploitation and environmental degradation within these areas of indisputable national interest. Some of these fish, such as salmon and eels, spend significant periods of their life-cycles in zones of the ocean in which they are vulnerable to exploitation by any nation. A question arises as to how the regulation of the use of such a resource should be premised.

At least two polar premises exist. One is that the State through which anadromous and catadromous fish pass should have the predominant, if not exclusive, right to regulate the exploitation of the fisheries associated with it.⁷ The other premise is that all interested States should have an equal right to participate in the regulation of these fisheries.⁸ This latter premise might be tenable since the historically international marine zones are essential to the life-cycles of many of the natural anadromous and catadromous fisheries. However, the first premise is superior to the second for reasons that have to do with maintaining public order and good stewardship of fishery resources.

One reason is that the "State of origin" or the "producing State"⁹

7. *E.g.*, 1974 United Nations Law of the Sea Conference [hereinafter Conference], Second Committee Informal Working Paper No. 4 (9 Aug. 1974) [hereinafter Sec. Com. WP4], Provision XIX (Formula C) and Provision XXIII (Formula A); Conference, Second Committee Informal Working Paper No. 5 (Aug. 13, 1974) [hereinafter Sec. Com. WP7].

Re catadromous fisheries: Conference, Sec. Com. WP4, Provisions XX and XXIV.

8. *E.g.*, Conference, Sec. Com. WP4, Provision XIX. (Formula B) and Provision XXIII (Formula B); Conference, Second Committee Informal Provision IV (Formula A, Part 5); Conference, Sec. Com. WP7, Provision XXII (Formula A) and Provision XXIII. These provisions do, however, pay lip service to the special interest of the "producing State" (*see* note 9, *infra*).

Conference, Sec. Com. WP4, Provision XIX (Formula A) is a compromise proposal.

9. The term "producing State" is used in this paper to mean a nation which geographically contains the locus of a significant part of the life cycle of a stock of anadromous or catadromous fish. The term here does

bears costs in maintaining the runs of fish. These costs include expenditures for research, fishways, pollution control, hatcheries, and domestic regulation. No other States bear any burden in regard to these fisheries except to the extent that they refrain from the destruction of the marine habitat or refrain from maximum exploitation of the fish stocks during their marine phase. If these other States are given a major voice in the regulation of these fisheries, there will be a tendency for the "producing State" to under-value the resource (resulting in the under-maintenance of the fishery during the critical fresh-water passage), unless the other states contribute significantly to reducing the economic burden of bearing the resource. A proposal addresses the problem in a special context by providing that "[t]he coastal State shall receive reasonable fees for fish caught by foreign vessels in its economic zone, with a view to making an effective contribution to coastal State fisheries management and development programmes."¹⁰ However, it appears that this proposal as drafted would not apply to the anadromous fisheries.

Secondly, the "producing State" is a "prominent solution,"¹¹ since the anadromous and catadromous fisheries are associated with objectively determinable nations. The alternative of "all interested nations" can only be determined by very subjective standards. This latter alternative contemplates a regulatory body that would be primarily a function of short-term demand with vagaries of expressed "interest" over the long-run, rather than a baseline regulatory body that can insulate a resource against roving exploitation.

A third reason, which may be powerful among laymen and politicians but which is question-begging, is the feeling that "those fish belong to us since they come from our country." This position has an antecedent in the Nineteenth Century fur seal controversy in which the United States attempted to assert jurisdiction over the harvesting of pelagic seals on the premise that the seals originated from islands owned by the United States.¹²

not imply exclusivity of production since more than one nation may be "producing States" for a stock of fish since, *e.g.*, certain stocks of salmon pass through the United States to reach redding areas in Canada. Furthermore, the portion of the life cycle spent in the ocean is also part of "production."

10. Conference, Sec. Com. WP7, Provision XVIII (Formula B, Part D).

11. The term comes from Deutsch, *supra* note 2.

12. See JOHNSTON, *supra* note 1, at 205-212, 264-269.

In sum, what is suggested here is not necessarily that the "producing States" should have exclusive rights to the bounty of anadromous and catadromous fisheries. Rather, it is suggested that it would be appropriate that these countries be given a predominant presumption of favor which cannot be infringed upon by the simple demand for exploitation by other nations.

The Law of the Sea Conference has before it several proposals for the control of anadromous fisheries which would adopt one of the premises in some form.¹³ While the vesting of the predominant interest or exclusive control in the "producing State" appears to be superior, it is not at all certain that such proposals will be adopted. There are some precedents in international controversies for deference to the "producing States", as evidenced in the recent agreement between Denmark and Canada with regard to Atlantic salmon. These precedents involve a few nations resolving real and present conflicts, but the Law of the Sea Conference should be trying to foresee and resolve potential conflicts as well.

If the world community is about to grant significant interests in ocean resources, the members of that community obviously would want something of the grants. A direct division of the regulatory authority and the catch is appealing, but such arrangements would tend to be unwieldy. As long as only a few nations are involved, the problem is not so significant.¹⁴ If more than a few nations are involved, the whole process can break down due to widely divergent interests appearing to be irreconcilable.¹⁵ The resulting tendency is to do as one wishes, which brings disaster to fisheries.¹⁶ The alternative is commendable. The anadromous and catadromous fisheries should be entrusted to the "producing States" at least to the extent that they have the decisive voice in developing the regulation of the anadromous and catadromous fish stocks.

TOTAL ALLOWABLE CATCH

While it is evident that the coastal States will be given the predominant, if not exclusive, legal interest in the coastal fisheries, proposals have been made that other nations be allowed to harvest the difference between the harvest by the coastal State and the

13. See notes 7 and 8, *supra*.

14. Clarkson, *International Law, U.S. Seabeds Policy and Ocean Resource Development*, 17 J. LAW & ECON. 117, 123 (1974) agrees.

15. See, e.g., Christy, *Northwest Atlantic Fisheries Arrangements: A Test of the Species Approach*, 1 OCEAN DEV. & INT'L L.J. 65 (1973).

16. Per a "tragedy of the commons." See G. HARDIN, *EXPLORING NEW ETHICS FOR SURVIVAL: THE VOICE OF THE SPACESHIP BEAGLE* (1968, 1972).

"allowable catch."¹⁷ While such a provision may be noble, it would be litigious. The problem is critical in those fisheries which have been over-exploited in the past and which could eventually become much more productive in the future. How much fish should be harvested as product and how much should be saved as capital is a highly complex problem involving questions of data collection, bio-mathematics, economics, and numerous assumptions of a social and political nature. Because of this complexity and because it is desirable to allow depleted fisheries to restore themselves, foreign fishermen should not be given a *right* to exploit the balance of an "allowable catch". The coastal State should be allowed to determine the amount of fish to be harvested by its fishermen, what portion (if any) to be harvested as a *privilege* by foreign fishermen, and what amount should be reserved as biological capital. The rationale of this suggestion is that the determination of the harvest should not be subject to determination by more than one authority since the alternative would apparently be a clash of resource practices. Of course, some supra-national authority may be needed to provide a basis for acting in the case of over-exploitation under the aegis of the national authority endangering the resource.¹⁸

The reason for granting the coastal States the predominant, if not exclusive, legal interest in the coastal fisheries is primarily political,¹⁹ although under some circumstances the externality consideration is valid to a limited extent.²⁰ However, there is at least one objectively good reason why the coastal States should have the predominant influence in the control of the coastal fisheries: coastal States are objectively determinable and their fishery zones can be mechanistically determined with a given zone width and baseline rules. Proposals to give land-locked nations a share of nearby coast-

17. *E.g.*, Conference, Sec. Com. WP4, Provisions XVI and XVII. Noteworthy is the proposal that a nation might prohibit any exploitation of marine mammals under its jurisdiction regardless of any theoretical "allowable catch". See Conference, Sec. Com. WP4, Provision XXVI.

18. See Kury, *The Application of a Market Theory to the Regulation of International Fisheries*, 1 OCEAN DEV. & INT'L L.J. 355 (1974).

19. Politics is, of course, the name of the game. See also, *e.g.*, Wooster, *Scientific Aspects of Maritime Sovereignty Claims*, 1 OCEAN DEV. & INT'L L.J. 13 (1973).

20. The economic and ecological aspects of environmental degradation re coastal fisheries are extremely complex and comprehensive studies are needed.

al fisheries²¹ produce complications but the result would still be relatively simple compared to the "all interested nation" approach.

FISHING AS A FREEDOM OF THE HIGH SEAS

A provision in one of the working papers of the conference has three formulations of a principle of freedom of the high seas.²² Fishing is included within the purview of the principle, which recognizes the *de facto* situation for high seas fisheries. The provision in any of its formulations is so open-ended and nebulous that its real significance cannot easily be pinned down. However, if the principle is to be elevated to a formal tenet by the conference, fishing should be specifically *excluded* as a freedom of the high seas.

The practical problem is that, for one reason or another, fishermen of a nation may wish to raid a high seas fishery. The freedom of the high seas principle, as now formulated, would give such an action protective coloration in law, which could effectively undermine, at least for an interim period, an otherwise good management program for the fishery. A partial remedy might be the elevation of a minor proposal to a general principle for the law of the sea. That now minor proposal is the provision that "No State can be exempted from the obligation to adopt conservation measures on the ground that sufficient scientific findings are lacking."²³ In the past, nations have used the argument of insufficient information as a means to avoid confronting critical conservation issues. The history of the International Whaling Commission is an important example.

The argument of insufficient information can be valid since it is conceivable that a nation or a group of nations would act to exclude fishermen of other nations from a fishing ground by basing the exclusion on a bogus management plan. This type of abuse can be remedied better by diplomacy than by simply sending in more fishing vessels to create a confrontation. In any case, despite the existence of highly sophisticated fishery models, practical considerations often prevent any precise understanding of a particular fishery. The argument can be pursued to the point that any management scheme would be open to question, a dangerous situation if fishing is to be considered a freedom of the high seas. Manage-

21. *E.g.*, Conference, Sec. Com. WP4, Provision X; Conference, Second Committee Informal Working Paper No. 9 (17 Aug. 1974), Provision XVII.

22. Conference, Sec. Com. WP7, Provision XV. *But see* JOHNSTON, *supra* note 1, at 303-317.

23. Conference, Sec. Com. WP4, Provision XXII (Formula A, Part 1[4]). *See also* Convention on Fishing and Conservation of the Living Resources of the High Seas, [1958] 17 U.S.T. 138, T.I.A.S. No. 5969.

ment plans or regulatory schemes which are in good faith and are based on realistic amounts of information need the protection of presumptions that fishing is not a freedom of the high seas and that conservation schemes are to be followed. The alternative is simply for the tendency to favor confrontation in the fishing areas.

THE NEED FOR A STEWARDSHIP PRINCIPLE

Mentioned throughout the various working papers are mildly worded statements that the productivity of the fisheries is to be maintained.²⁴ Unfortunately, no provision clearly appears for correcting a situation in which a nation over-exploits a particular fishery. Mistaken application of economic theory combined with a fatalistic belief in the ineffectiveness of international law might be conducive to the harvesting to the point of exhaustion, or even extinction in the case of some of the great whales. Interest rates²⁵ and capital theory simply do not justify the total harvesting of these biological forms nor does the "tragedy of the commons"²⁶ dictate irremediable irrational results since the "commons" qua "commons" can be eliminated.

The decline of the great whales illustrates the problem. Industry negotiations failed in conserving the great whales, particularly the blue whale. The reasons for this failure lay in the political-legal matrix surrounding the economic framework of whaling. Illusions dominated facts and exploitation eventually precluded timely, thoughtful resolution. George Small drafted a conservation brief on the demise of the blue whale,²⁷ in which the whaling countries, particularly Japan, were indicted for the gross mismanagement of a magnificent resource, or, if you would, a favorite companion on Spaceship Earth.²⁸ Small concluded that the reasons for the failure

24. *E.g.*, Conference, Sec. Com. WP4, Provision XXI, and Sec. Com. WP7, Provisions XVI, XVII, and XX.

25. See Clark, *Profit Maximization and the Extinction of Animal Species*, 81 J. POL. ECON. 950 (1973).

26. Hardin, *supra* note 16.

27. G. SMALL, *THE BLUE WHALE* (1971).

28. *MIND IN THE WATERS: A BOOK TO CELEBRATE THE CONSCIOUSNESS OF WHALES AND DOLPHINS* (J. McIntyre ed. 1974).

George F. Kennan has taken a position that the interests of "mankind generally, together—and this is important—with man's animal and vegetable companions" must be the basis of environmental conservation. See Kennan, *To Prevent a World Wasteland: A Proposal*, 48 FOREIGN AFFAIRS 401, 408 (1970).

of the International Whaling Commission to effectively conserve the whales were three. First, the Commission chose to hold its meetings in private with access denied to the press. Second, the Commission was perpetually under-financed. Third, and most important, the Commission was denied the power to impose effective restrictions on each of its members without each member's consent.

A few additional points are worth mentioning in regard to the ineffectiveness of the International Whaling Commission. First, the Japanese commissioner to the International Whaling Commission from 1951 through 1965 (a critical period in the demise of the blue whale) was not a government official as such but rather was the chairman of the Japan Whaling Association, an organization of whaling companies.²⁹ The conflict of interest in such an appointment is obvious in light of Dr. Harry Lillie's comment that:

The President of the largest Japanese whaling company . . . was indeed difficult to deal with, insisting on breaking off all further discussions if I could not agree with him that there were plenty of whales left and that the killing could go on without restrictions. The President of the third company . . . , while not as extreme, was just as determined to go on with the killing until such time as the industry collapsed from the wiping out of the whales.³⁰

The pursuit of illusion by the Japanese went so far as the postulating of a new subspecies of blue whale which could be harvested in an unregulated manner since it was not within the effective purview of the existing agreements. Such a postulation was entirely untenable.³¹

Although self-righteousness and greed are not to be underestimated in resource executives, it is not necessary to ascribe these qualities to the whaling executives. They could have been simply mistaken in their understanding of resource economics. After all, a fisheries economist at a prominent American university opined in a letter that "[t]he problem . . . is a standard problem in capital theory and I do not agree that certain species should not be fished out if it is economic to do so".³² The professor is, of course, begging the question, a peculiarity not limited to laissez-faire market economists since it appears that Marxian philosophy is similarly hamstrung in resource management.³³

The great whales existed in an international arena unstructured in international law, yet no one nation or group of nations apparently felt it to be in its interest or had the capability to force

29. Small, *supra* note 27, at 159.

30. *Id.* at 161.

31. *Id.* at 200-02.

32. In my personal files.

33. See P. PRYDE, CONSERVATION IN THE SOVIET UNION 42-44 (1972).

a major confrontation with Japan or other whaling nations. Little could be done without an evolutionary major confrontation since at that time no rights were vested in non-exploiting countries. Hence, any strong action (e.g., major trade restrictions) by the non-exploiting nations to effectuate conservation measures by the exploiting nations would have appeared to the world community to be unreasonable. This conceptual block to action might have been avoided by conferring property status on the great whales,³⁴ but this solution would have been dependent upon a much higher degree of concern than apparently was present in the world community from 1945 to 1965. The fault, then, in the management of the great whales was not necessarily the inexorable operation of economic forces but rather the decision-makers' perceptions of the problem and their lack of willingness to act effectively to conserve the whales.

The problem has not been limited to whales, since "fish fisheries" can be "exhausted," i.e., the stock becomes so depleted that the productivity is so far below the environmental potential that maximum productivity cannot easily be regained. Because of this exhaustion problem, as well as the extinction problem, the law of the sea should include some sort of remedy to correct mismanagement of resources. One possible remedy would be the specification of compulsory United Nations jurisdiction over marine fisheries and the automatic loss of rights and privileges to the harvest if the fishery becomes endangered. In other words, the law of the sea should reflect the fact that fishery resources can be abused and a means should be provided so that control of the endangered resource can be easily exercised by an authority with broader concerns than short-run profits. As long as the law of the sea divides up the resources so that some sort of right is recognized to vest in certain nations, other nations which may be concerned about these originally international resources might not act to preserve the resource if the law does not specify that they may act to protect their interests (even if these interests might only be potential). The alternative is that a certain right to the fisheries will stymie any exercise of uncertain rights of ultimate control.

This problem of stewardship raises a fundamental question about the Law of the Sea Conference. Is the *raison d'être* of the con-

34. See Kury, *supra* note 18.

ference the coordination of unilateral actions by the various countries or a convocation of the world body politic from which will be derived the law of the sea? It is conceivable that in the negotiations leading to the division of the fisheries a right will be retained to act against a nation which is destroying a renewable resource, but such a provision is unlikely despite how much it is needed.

CLOSING COMMENT

It appears that the Law of the Sea Conference is moving towards some comprehensive *corpus juris* for international fisheries, which in itself would produce an increase in world order and in marine conservation since many of the rules will be clarified and certain practices and positions will become untenable. It is clear that the nations of the world are not about to give the ocean resources to the United Nations and that discussion at the conference centered on the division of the bounty of the seas. Real choices exist, nevertheless, and it remains to be seen what the Law of the Sea Conference will finally favor.